Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN M. DUNN,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari
to the Indiana Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Indiana Supreme Court has held that the regulatory "takings" analysis under the Indiana Constitution is the same as the Fifth Amendment "takings" analysis as interpreted by *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005) and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

1. Whether the Fifth Amendment's "takings" standards allowed the Indiana Court of Appeals to create an absolute rule that a compensable taking can never result from the construction of a traffic median which eliminates certain ingress/egress critical to a commercial property if **any** ingress/egress remains to the property, notwithstanding the uncontested evidence that the median impaired access so as to destroy the economic and productive use of the commercial hotel property?

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CONSTITUTIONAL PROVISIONS

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Petitioner, John M. Dunn ("Dunn"), respectfully petitions for a writ of certiorari to review the judgment of the Indiana Court of Appeals in this case.

OPINIONS BELOW

The trial court's summary judgment entry is unreported. (Appendix B1-2). The judgment of the Indiana Court of Appeals reversing the trial court's summary judgment entry is reported at 888 N.E.2d 858 (Ind. Ct. App. 2008). (Appendix A1-27). The ruling of the Indiana Court of Appeals denying Dunn's Petition for Rehearing is unreported. (Appendix C1).[1] The ruling of the Indiana Supreme Court denying Dunn's Petition to Transfer is reported at 891 N.E.2d 51 (Ind. 2008). (Appendix D1-2).

JURISDICTION

The Opinion – For Publication of the Indiana Court of Appeals was entered on June 25, 2008 ("Opinion"). The Indiana Court of Appeals denied a timely Petition for Rehearing on August 19, 2008. On March 4, 2009, the Supreme Court of Indiana denied a timely Petition to Transfer.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

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[1] Notice of the ruling from the Clerk, Appendix C1, contains a scrivener's error stating that the "Supreme Court" denied the petition for rehearing but correctly notes that the Court of Appeals Judges denied said petition.

CONSTITUTION PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides that "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides "nor shall any state deprive any person of life, liberty, or property, without due process of law."

Article I, Section 21 of the Indiana Constitution provides that "no person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

STATEMENT OF THE CASE

Dunn filed his inverse condemnation complaint against the State of Indiana ("State") on September 9, 2003, and an amended complaint for inverse condemnation on December 7, 2004. (State Appellate Appendix hereinafter "App." 26, 31-34). [2]

The State filed a Motion for Summary Judgment on January 18, 2005, and Dunn filed his Cross-Motion for Partial Summary Judgment on the issue

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[2] Citations herein, other than to the Appendix filed with this petition, are to record documents contained in the appendices, briefs or petitions filed by the State and Dunn with the Indiana Court of Appeals or the Indiana Supreme Court.

of a "taking" on March 2, 2005. (App. 50-51; 111-113). All the evidence presented by Dunn at the summary judgment stage was uncontested and uncontroverted by the State.

Pursuant to a ninety-nine (99) year lease dated September, 1977, Dunn leases real estate near the southeast corner of Green River Road and the Lloyd Expressway ("Expressway") in Evansville, Indiana, (the "Property") upon which a hotel is situated ("Hotel"). (App. 88-89, 114). Dunn has operated a Hotel on the Property since 1978. (App. 115).

As a result of a prior condemnation in 1986 which eliminated all then existing access to the Property, the Hotel's only access to the public highway system has been to and from Green River Road via a State-owned "service road" which was acquired in 1986 solely to provide Dunn's Hotel with access to Green River Road. (App. 70-79, 89, 115-116).

From 1986 until July 2004, vehicular access to and from the Property at the Green River Road entrance was unrestricted. (App. 89, 115-116). In July 2004, the State, as part of the modification of the Expressway/Green River Road interchange, constructed a raised concrete median barrier (the "Median Barrier") in the center of Green River Road which completely prevents left turn access from southbound Green River Road into the only entrance to the Property, and also prevents left turns out of the Property onto the southbound

lanes. (App. 88, 116). The Median Barrier was constructed, in part, to specifically restrict access to Dunn's Hotel Property. (App. 166).

Ease of vehicular access into and egress from the Property was a critical factor in the ability of the Hotel to be economically productive and the Median Barrier substantially impaired access to the Property thereby destroying the productive use of the Hotel. (App. 117, 119, 122-123; Dunn Appellate Appendix hereinafter "Dunn App." 5-6, 11-15). Nearly all guests accessed the Hotel by exiting from the Expressway onto Green River Road and turning left into the Hotel Property, while traveling south on Green River Road. (App. 123).

Vehicular ingress and egress remaining available to the Property after the construction of the Median Barrier was insufficient to support the operation of the Hotel upon the Property and the Hotel suffered its first unprofitable year in 25 years in 2004. (App. 119-120, 123; Dunn App. 5-6, 12-14). The Hotel operated with consistent financial success during the period between 1978 and 2003. (App. 115, 123-124). A licensed real estate appraiser testified by affidavit that the value of Dunn's Property interest decreased from $2,490,000.00 to $480,000.00 as a result of the construction of the Median Barrier. (Dunn. App. 22-112). The State did not conduct any study, investigation or research to determine whether the remaining vehicular access to the Property was sufficient to support the Hotel operation or whether the construction of the

Median Barrier diminished the value of Dunn's property rights. (Dunn App. 120-122).

In an order dated September 2, 2005, the trial court denied the State's Motion for Summary Judgment and granted Dunn's Cross-Motion for Partial Summary Judgment, determining that the construction of the Median Barrier resulted in a "taking" of Dunn's property rights. (App. 219-220).

A jury trial on the issue of damages was conducted from April 9-13, 2007, and the jury entered a verdict in favor of Dunn resulting in a judgment on said verdict.[3] (App. 27-28).

The federal issues were raised below and ruled on below.

Dunn first presented the federal question in his Amended Complaint for Inverse Condemnation, stating generally that "[t]he action of the State of Indiana, as herein described, constitutes a taking of Dunn's property without just compensation." (App. 32.)

On March 2, 2005, Dunn filed his Cross Motion for Partial for Summary Judgment on the basis that a "taking" occurred. (App. 111-113). In a

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[3]The Indiana Court of Appeals' Opinion only addressed the summary judgment "taking" decision and, therefore, did not address the jury verdict issues raised by the State on appeal. As a result, the only issue before this Court relates to the "taking" determination.

summary judgment brief, Dunn quoted the specific section of the Indiana Supreme Court opinion in *Department of Natural Resources, et al. v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000 (Ind. 1989), which addressed in detail "the constitutional standards for an individual's right to compensation when the exercise of governmental regulatory power imposes a substantial economic impact upon that individual's private property." (App. 196-197). *DNR* specifically cited and quoted the regulatory takings analysis under U.S. Supreme Court precedents including, *Mahon* and *Penn Central.*

It was asserted therein that "Mr. Dunn's claim in this case clearly meets those [federal] standards." (App. 196). The crux of Dunn's argument was that the analysis for purposes of determining whether or not a "taking" had occurred is the same whether "couched in terms of classic eminent domain principles . . . or in terms of the regulatory power of the State . . . ." (App. 197).

Dunn thereafter filed his "Supplemental Authority" in support of his motion for summary judgment, citing pages 1002-1003 of *DNR* which incorporates U.S. Supreme Court authority and "speaks to the legal test for a determination of entitlement of an owner of private property to compensation in the event of the exercise of a governmental police power." (App. 208-218).

On September 12, 2005, the trial court granted Dunn's Motion for Partial Summary Judgment, without specific constitutional citation, but

determining that the State had taken Dunn's property rights. (App. 219-220). After entry of judgment on the jury verdict, the State filed its Notice of Appeal and appellant's brief. (App. 3).

At the appellate level, Dunn filed his brief of appellee and therein asserted, with case citations, that "Indiana case law – as well as long-standing federal authority – recognize that where government interferes substantially with the reasonable investment-backed expectations of an owner of commercial property, the government action constitutes a 'taking.'" Dunn brief of appellee, p.27. Dunn further stated as follows:

> The State's assertion that it can use its police power to eliminate the economically viable present use of Dunn's interest without incurring the obligation to compensate Dunn is inconsistent with state and federal constitutional law.

Id., p.30.

On June 25, 2008, the Indiana Court of Appeals reversed the trial court's grant of summary judgment. In its Opinion, the Court of Appeals acknowledged Dunn's argument that federal "regulatory takings cases apply." *Dunn*, 888 N.E.2d at 867, footnote 11. The Court of Appeals did not expressly rule on Dunn's federal questions.

The parties argue on appeal about whether Dunn's claim is actually a regulatory takings claims such that *Biddle*, 860 N.E.2d at 570, and other regulatory takings cases apply. *Biddle* articulates that the modern test for regulatory takings "states that regulation effects a taking if it deprives an owner of all or substantially all economic or productive use of his or her property." Id. at 577. (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-540 (2005)). The state argues that "Dunn presents no authority suggesting that *Biddle* . . . and other such cases apply when the State makes improvements to its roadways." Appellant's Br. p. 11. We need not delve into this question because, as we conclude in this opinion, Dunn's claim is, at its heart, that he had a right to the free flow of traffic past his business. *Ensley* speaks to this issue directly, and to the extent that *Biddle* comments upon *Ensley* it does so to clarify the degree of injury that a landowner must suffer in order to have experienced a compensable taking. *Biddle*, 860 N.E.2d at 580. Pursuant to *Ensley*, we never reach that question in this case because Dunn does not have a property right in the flow of traffic.

Id. The Opinion, therefore, rejected Dunn's federal constitutional questions. However, those federal questions were preserved and are presented here.

After his timely Petition for Rehearing was denied, Dunn timely filed his Petition to Transfer with the Indiana Supreme Court. Dunn's Petition to Transfer presented the following question for review:

> "Whether the Opinion departs from accepted constitutional analysis and is in conflict with the U.S. Supreme Court's decisions in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1992), and *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005), and the Indiana Supreme Court's decisions in *Ensley and Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570 (Ind. 2007), by failing to make a fact sensitive inquiry and creating a per se constitutional standard that the State's construction of the Barrier cannot, as a matter of law, result in the compensable taking of Dunn's access rights even though the trial court found and the undisputed evidence establishes that the impact of the State action deprived Dunn of all or substantially all economic and productive use of his property and interfered with his reasonable and distinct investment-backed expectations?

Dunn's Petition to Transfer, p.1.

Dunn's Petition to Transfer argued that the Indiana Court of Appeals created a generalized constitutional standard and that the Court of Appeals disregarded longstanding U.S. Supreme Court precedent holding that whether or not a compensable taking occurred must be determined based on the particular facts of each case. *Id.*, p.7. Indeed, the second section under Dunn's Argument is entitled: "The Opinion significantly departs from accepted law and conflicts with Supreme Court precedent." *Id.*, p.9.

The thrust of Dunn's argument is that the Indiana Court of Appeals erred by applying a "straightforward rule" because it did not engage in "the factual inquiry required by *Mahon, Lingle* and *Biddle*." Petition to Transfer, p.10. Dunn asserted that this violated his state and federal constitutional rights because the new test was significantly at odds with the aforementioned "binding constitutional precedent." *Id.* In sum, Dunn raised the federal issues in his Petition to Transfer by asserting that "[t]his court should accept transfer to insure that fairness and justice consistent with the standard required under the U.S. and Indiana Constitutions are accorded Dunn and other property owners in all inverse condemnation cases involving ingress/egress issues." *Id.*, p. 11.

In Dunn's Petition to Transfer Reply Brief, Dunn again raised the issue that the Indiana Court of Appeals' Opinion failed to follow constitutional precedent and deprived Dunn of his constitutional right to just compensation for the State's taking of his property interest. (Dunn's Petition to Transfer Reply Brief, p.3). Dunn again cited *Lingle*, for the proposition that the legal determination of whether a taking occurred required a factual inquiry surrounding the State's action. (Dunn's Petition to Transfer Reply Brief, p. 1). Dunn argued that the Indiana Court of Appeals "did exactly what the Supreme Court in *Mahon* rejected – disposed of Dunn's case by a general proposition rather than an inquiry of the particular facts." (Dunn's Petition to Transfer Reply Brief, p. 3). In addition, because Indiana uses the "prevailing federal standard" in *Lingle* and *Penn Central* to analyze a regulatory "takings" claim under the Indiana Constitution, the federal questions were necessary to any determination of Dunn's inverse condemnation claims. "The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969).

REASONS FOR GRANTING THE PETITION

1. Indiana uses the Fifth Amendment's regulatory "takings" standards set forth in *Lingle* and *Penn Central.*

Article I, Section 21 of the Indiana Constitution provides that "No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." The Fifth Amendment of the U.S. Constitution similarly provides that "nor shall private property be taken for public use, without just compensation." The Fifth Amendment's Takings Clause applies to the states via the Due Process Clause of the Fourteenth Amendment. *Webb's Fabulous Pharms, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

The Indiana Supreme Court has held that the Indiana and federal takings clauses are textually indistinguishable and are to be analyzed identically. *Cheatham v. Pohle*, 789 N.E.2d 467, 472-73 (Ind. 2003) (citing *B & M Coal Corp. v. United Mine Workers of Am.*, 501 N.E.2d 401, 406 (Ind. 1986)); See also *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 580 (Ind. 2007). "The modern test states that regulation effects a taking if it deprives an owner of all or substantially all economic or productive use of his or her property." *Id.* at 577 citing *Lingle and Penn Central.* Thus, regulatory takings challenges under the Indiana Constitution are governed by "the prevailing federal standard" in *Lingle* and *Penn Central.*

State v. Kimco of Evansville, Inc., 902 N.E.2d 206, 211 (Ind. 2009); *Biddle*.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court recognized "that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster and that such "regulatory takings" are compensable under the Fifth Amendment." *Lingle,* 544 U.S. at 537. In Justice Holmes' storied but cryptic formulation, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* quoting *Mahon*, 260 U.S. at 415.

In examining precedent as to how far is "too far," this Court held that Fifth Amendment "regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)," except in certain limited situations not relevant in the case at bar. *Lingle*, 544 U.S. at 538. The factors considered under *Penn Central* are the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action. *Penn Cent.*, 438 U.S. at 124. "The *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle* , 465 U.S. at 540.

Thus, the Indiana and U.S. Constitutional "takings" standards required an ad hoc factual inquiry into the impact of the Median Barrier on Dunn as property interests per *Lingle* and *Penn Central.*

2. The regulatory "takings" categorical rule established by the Indiana Court of Appeals conflicts with *Lingle* and *Penn Central.*

While its regulatory takings analyses "cannot be characterized as unified," this Court's inquiries "share a common touchstone." *Lingle*, 544 U.S. at 539. "Each aims to identify regulatory actions that result in the functional equivalent of the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.* Therefore, the focus is upon "the severity of the burden that government imposes upon private property rights." *Id.* As a result, a regulatory takings claim based upon access impairment requires an ad hoc factual inquiry into the *Penn Central* factors in accordance with *Lingle* .

Ignoring *Lingle 's* constitutional standard, the Indiana Court of Appeals created a rigid generalized rule that a taking can **only** occur in a loss of access case when the State's exercise of its police power eliminates **all** access to a public roadway even where the State singles out a particular property owner and the resulting State action destroys the economic and productive use of that owner's property.

The Indiana Court of Appeals never undertook a factual inquiry as to Dunn's degree of injury, instead stating that he has no "property right in the flow of traffic" and that a "discussion relating to damages is [un]necessary to the question of whether a compensable taking occurred." *Dunn*, 888 N.E.2d at 867, footnotes 10 and 11. The Court of Appeals attempts to do indirectly that which it cannot do directly under the Fifth Amendment's constitutional standard; namely, ignore the impact of the Median Barrier on Dunn's Hotel and his property interests. Because the Fifth Amendment's "takings" standard requires an ad hoc factual inquiry, the Indiana Court of Appeals erred by failing to apply that standard consistent with Supreme Court precedent.

3. Indiana recognizes ingress and egress as property rights subject to constitutional protections.

While the meaning of "property" as used in the Fifth Amendment is a federal question, "it will normally obtain its content by reference to local law." *United States v. Causby, et ux*, 328 U.S. 256, 266 (1946). Indiana courts, as well as courts generally, recognize that the constitutional term "property" includes "the entire group of rights inhering in a citizen's ownership." *Center Townhouse Corp. v. City of Mishawaka*, 882 N.E.2d 762, 768 (Ind. Ct. App. 2008) quoting *McNamara v. Rittman*, 838 N.E.2d 640, 645 (Ohio 2005).

It is well settled in Indiana that a property owner's right of ingress from and egress to a public highway, "is a property right which cannot be substantially or materially interfered with or taken away without due compensation. *State v. Ensley*, 240 Ind. 472, 164 N.E.2d 342, 348-349 (1960); *State, etc.* v. *Marion Circuit Court, et al.*, 238 Ind. 637, 643, 153 N. E. 2d 327 (1958); *State v. Lovett*, 254 Ind. 27, 257 N.E.2d 298, 304 (1970).

Dunn's Amended Complaint alleged that, prior to construction of the Median Barrier, there was "unrestricted vehicle access to the [Hotel] from both the northbound and southbound lanes of Green River Road" and that the construction of the Median Barrier "substantially and materially eliminated and impaired vehicular access to the [Hotel] and vehicular egress from the [Hotel]. (App. 117, 119, 123). The uncontroverted evidence established that such ingress and egress were critical to the Hotel's commercial viability.

Thus, Dunn alleged a taking by the State of his constitutionally protected property rights in the form of an impairment of ingress from and egress to the public roadway which, in turn, substantially impaired the value and the economic and productive use of his Property.

4. The State's power to construct the Median Barrier comes with constitutional limits.

The Indiana Court of Appeals announced a rigid constitutional rule that the State's construction of a traffic median in exercise of its police power which eliminates certain ingress/egress can never result in a "taking" under the Takings Clause of the Indiana and U.S. Constitutions as long as **any** access to the property remains, without regard to the economic harm it causes or whether the remaining access is sufficient or not to support the property owner's ongoing business operation.

Basing its decision upon the Indiana Supreme Court's 1960 holding in *State v. Ensley, supra,* the Indiana Court of Appeals stated:

> The construction of a divider strip or median that acts to create a more circuitous route to and from a parcel of land "does not deprive [the landowner] of any property right" and any "loss of business or depreciation in the value of the property" is simply non-compensable. *Ensley* makes clear that landowners lack property rights in traffic flow such that the construction of a median cannot constitute a compensable taking.

Dunn, 888 N.E.2d at 863-864, 869

This categorical, unbending rule ignores the potential economic impact of a traffic median upon means of access and conflicts with the right of an owner of commercial property to receive just compensation for regulatory governmental action which directly and substantially destroys the property owner's "distinct investment-backed expectations."

If not overruled, the Indiana Court of Appeals' Opinion grants the State unlimited power to utilize traffic barriers to impair access to any commercial property to such a degree that it completely destroys the productive use of the property and forces the property owner to alone bear the public's burden.

This Court has long recognized that police power regulations may rise to the level of a taking if the restrictions they impose are sufficiently severe or onerous. See, *e.g.*, *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 174-175 (1979); *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979); *Penn Central, supra*, at 130-131, 138, n. 36; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Pennsylvania Coal Co.* v. *Mahon* , 260 U.S. 393, 415-416 (1922).

While there is no set formula to determine where regulation ends and taking begins, *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962), constitutional protections ensure that a state cannot exercise its

police power in complete disregard for the damage such actions impose upon property rights. The rule applied in this case by the Indiana Court of Appeals does not recognize that limitation. By failing to undertake a factual inquiry into the magnitude of the Median Barrier's economic impact on Dunn and by failing to determine whether the regulatory action went "too far," the Indiana Court of Appeals failed to conduct the constitutionally required review in this case.

5. The Indiana Court of Appeals was constitutionally bound to assess the Median Barrier's economic impact on Dunn.

In addressing a regulatory takings case, *Lingle* held that the applicable constitutional standard requires consideration of the economic impact of the regulation on the claimant, the extent of regulatory interference with distinct investment back expectations, whether the regulatory action ousts the owner from his domain, and the severity of the burden upon private property rights. *Id.* 544 U.S. at 539-542. As *Lingle* makes clear, a regulatory taking analysis focuses primarily on the impact or burden imposed on the claimant by the regulation. *Id.* at 538-539.

The Indiana Court of Appeals in this case only considered the Median Barrier's impact on the general public, i.e., traffic flow. *Dunn*, 856 N.E.2d at 867. Dunn asserted his claim based upon the economic impact of the State's regulatory action, which so impaired vehicular access that it deprived

him of the productive use of his Hotel Property. Dunn had a constitutionally protected right of reasonable vehicular ingress/egress to allow for the economic and productive use of his Property in its present use. *Ensley,* 164 N.E.2d at 348-349, *State v. Peterson*, 269 Ind. 340, 381 N.E.2d 83, 85 (1978).

Despite the State's regulatory action, which directly and uniquely impacted Dunn's access and his Hotel Property, the Court of Appeals refused to consider the Median Barrier's economic impact or the severity of its burden upon Dunn's property interests. Both the Indiana and U.S. Constitutions require that fact-based analysis under *Lingle* and *Penn Central* to ensure that Dunn does not bear the public burden "which, in all fairness and justice, should be borne by the public as a whole." *Lingle,* 415 U.S. at 537 .

If the Opinion of the Indiana Court of Appeals is not reversed, even if the State's action deprives a landowner such as Dunn of all or substantially all economic or productive use of his commercial property, no taking of property rights can occur in an access impairment case caused by a median except where ingress and egress are completely eliminated. This novel constitutional declaration improperly focuses on the impact on the general public and neglects the application of the Fifth Amendment's required fact sensitive inquiry regarding the impact upon the property owner.

This categorical rule cares nothing about the magnitude or character of the burden the State's

action imposed upon Dunn's private property rights. Nor does it provide for any public responsibility, through the State, for the undue imposition of extreme economic loss upon a single property owner in order to suit public safety. Such a rule "does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause." *Lingle* , 544 U.S. at 542.

6. The Court of Appeals cannot avoid the required constitutional analysis by elevating form over substance.

The unique and critical importance of ingress and egress to Dunn's business operation was never contested by the State and the long standing property rights of ingress and egress of an Indiana property owner are without dispute.

Logic dictates that if there exists a basic property right to ingress and egress, and if that property right is so substantially abridged by the State that the economic and productive use of the property in its present use is significantly diminished, then a "taking" of some portion of that basic property right has occurred. It is no different in effect than what occurs with a physical taking of an essential part of the land itself.

Nevertheless, in its Opinion, the Court of Appeals cites *Ensley v. State*, supra, for the proposition that:

> *Ensley's* legacy is a clarification of the very different treatments that two types of loss of access claims will receive under Indiana law. On the one hand, cases which allege damages resulting from an alteration of traffic flow ("traffic flow cases") present no cognizable claim for compensation under Indiana eminent domain law because landowners do not have a property right in the free flow of traffic past their land. On the other hand, cases which allege interference with a landowner's rights of ingress and egress ("ingress/egress cases") may present a compensable taking where the interference is substantial or material.

Dunn, 888 N.E.2d at 864.[4]

This statement begs the question of why a "traffic flow case" cannot also be an "ingress/egress case". And, of course, it can be. As already noted, Dunn's complaint did allege interference with his rights of ingress and egress because of the Median Barrier. But the Indiana Court of Appeals applied no constitutionally required test to determine

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[4] The Indiana Supreme Court approved of this distinction in *Kimco*, 902 N.E.2d at 214.

whether, based upon the evidence, the interference was substantial or material enough to rise to the level of a taking. Distinguishing "traffic flow cases" from "ingress/egress cases" wholly ignores the fact-sensitive inquiry required by *Lingle*.

The Court of Appeals conceded that the Median Barrier was "designed as a safety measure" to eliminate certain ingress/egress between the Hotel and the public roadway. *Dunn*, 888 N.E.2d at 860. This recognized that the State's regulatory action was, in part, aimed directly at diminishing Dunn's access rights for the benefit of the general public. Before construction of the Median Barrier, ingress to the Hotel was available (i) by turning left while traveling South on Green River Road and (ii) by turning right while traveling North on Green River Road; egress was possible (iii) by turning right (North) onto Green River Road or (iv) left (South) onto Green River Road. After construction of the Median Barrier, ingress is only possible (i) by turning right while traveling North on Green River Road and egress is only available by (ii) turning right (North) onto Green River Road. Thus, the Median Barrier reduced available ingress/egress by at least 50% and eliminated all left turn access to the Hotel Property for travelers exiting the Expressway. The undisputed evidence was that the Median Barrier so restricted vehicular access that the economic viability of the Hotel was destroyed.

The assertion that there are two differing constitutional standards for "traffic flow cases" and

"ingress/egress cases" is incorrect on its face and creates a distinction without a difference. As the Court of Appeals' Opinion concedes, "traffic flow cases" and "ingress/egress cases," as it categorizes them, are both "loss of access" cases. *Dunn*, 888 N.E.2d at 864. Applying differing constitutional analyses to "loss of access" claims based upon whether or not a median is the cause of the loss of access is contrary to *Lingle* and elevates form over substance.

Any time a median is constructed, circuity, traffic flow, inconvenience and ingress/egress are impacted to some degree. Every traffic flow case is an ingress/egress case and vice versa. The creation of an arbitrary classification, i.e., "traffic flow cases," into which claims based upon the impact of medians are cast, and then applying a rigid "per se" rule that eliminates the need for a fact-based analysis in those loss of access cases is directly contrary to the U. S. Supreme Court precedent in *Lingle* and *Penn Central.*

The Median Barrier's traffic flow impact and its ingress/egress impact result from the very same State action. Constitutional precedent requires a court in these circumstances to consider the *Penn Central* factors to determine whether the Median Barrier caused Dunn's ingress/egress to become so restricted as to create the functional equivalent of a classic taking in which government appropriates private property or ousts the owner from his domain. "A test that tells us nothing about the actual burden imposed on property rights, or how

that burden is allocated cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation." *Lingle*, 544 U.S. at 543. The Indiana Court of Appeals relied on *Ensley* to establish a per se constitutional rule which fails to satisfy that prevailing federal constitutional standard.

That standard requires a consideration of all relevant factors regarding the economic impact on the property of the imposed regulation. The generalized and absolute rule that the Indiana Court of Appeals applied in this case, which it considers to be a "traffic flow" case, fails to comply with the constitutionally required fact sensitive inquiry required in all impaired access cases.

The deficiency of the Court of Appeals' generalization is obvious. By labeling a claim, arbitrarily, as a traffic flow case, the state regulatory action becomes immune from challenge, and no constitutional recourse exists for a property owner even though the state action may deprive him of all economic and productive use of his property. *Lingle* precludes such disregard for constitutionally protected property rights. The purpose of the takings clause is to ensure fairness to both the property owner and the public. *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1282 (Fed. Cir. 2009) citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "When balancing the factors adduced through the *Penn Central* analysis, our objective is to ascertain whether, in light of those factors, it is unfair to force the property

owner to bear the cost of the regulatory action." *Rose Acre Farms, Inc.*, 559 F.3d at 1282.

Lingle sets forth the established standards for reviewing regulatory "takings" claims and Indiana courts cannot apply those standards by creating arbitrary classifications which ignore the long standing protections afforded "easements of ingress and egress in a public highway . . . which cannot be substantially or materially interfered with or taken away without due compensation." *Ensley,* 164 N.E.2d at 487.

7. The construction of the Median Barrier resulted in a taking of Dunn's property rights.

As noted above, ingress and egress are constitutionally protected property rights under Indiana law. Dunn presented undisputed evidence that left-turn ingress from and egress to the public roadway is a critical factor to the economic viability of his Hotel property, and that construction of the Median Barrier impaired that access to such a degree that it deprived him of the economic and productive use of his property rights and Hotel. (App. 117, 119-120, 122-123; Dunn App. 5-6, 11, 13-15).

In addition to Dunn, two experts, with a combined 41 years of experience in the hotel/motel/hospitality industries, confirmed, based upon their review and physical inspection of the Property and its books, that the construction of the Median Barrier impaired vehicular access so

severely that it destroyed the economic viability of the Hotel and Dunn's distinct investment-backed expectations. (Dunn App. 5-6, 11, 13-15). Similarly, the financial evidence established that between 1978 and 2003, the Hotel operated with commercial success. (App. 115). After construction of the Median Barrier, the Hotel became unprofitable. (App. 118-119, 123-126).

As noted in *Lingle*, the primary factors in a regulatory takings case are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* at 539. The economic impact of the Median Barrier on Dunn was catastrophic and resulted in the financial ruin of his business enterprise. Dunn's continual investment in his Hotel Property over a period of 25 years created distinct investment-backed expectations which were destroyed as a result of the Median Barrier. Thus, the primary constitutional fact-based test which establish a regulatory taking was met by Dunn's evidence.

Lingle further held that the character of the government action, i.e., whether it amounts to a physical invasion or merely affects property interests through some public program adjusting benefits and burdens of economic life to promote the common good, may also be relevant in discerning whether a regulatory taking has occurred. *Id.* 544 U.S. at 539. The undisputed evidence established that the injury suffered by Dunn as a result of the construction of the Median

Barrier was of a kind, different in degree and nature from the inconvenience suffered by the general public due to the Median Barrier. Dunn's particular private injury -- the impairment of access, the loss of his economic and productive use of the Property as a Hotel, and the consequent loss of his distinct investment-backed expectations, is no different in its impact or practical effect than a physical taking which directly appropriates private property or ousts the owner from his domain. The Court of Appeals' Opinion forced Dunn "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong,* 364 U.S. at 49.

Thus, the only relevant evidence on the *Penn Central* factors conclusively established that Dunn suffered a compensable taking under the Indiana and U.S. Constitutions as a result of the construction of the Median Barrier. The Indiana Court of Appeals, however, failed to apply *Lingle's* "prevailing federal standard" and instead erroneously created a rule that disregards required constitutional analysis in loss of access "takings" cases.

CONCLUSION

Based upon the foregoing, Petitioner, John M. Dunn, respectfully requests the Court to grant his petition for writ of certiorari.

Respectfully submitted,

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FOR PUBLICATION

IN THE
COURT OF APPEALS OF INDIANA
[Filed June 25, 2008]

No. 82A01-0705-CV-223

STATE OF INDIANA,
Appellant-Defendant,
vs.
JOHN M. DUNN,
Appellee-Plaintiff.

APPEAL FROM THE
VANDERBURGH CIRCUIT COURT
The Honorable J. Douglas Knight, Special Judge
Cause No. 82C01-0309-PL-668

OPINION – FOR PUBLICATION

VAIDIK, Judge

Case Summary

The State's construction of a median strip that makes the route of travel to a business property more circuitous is not a compensable taking. We therefore reverse the trial court's partial summary judgment in favor of business owner John M. Dunn against the State and the subsequent damages awarded to Dunn by a jury.

Facts and Procedural History[1]

Dunn entered the hotel business in 1978. Since that time, he has developed, owned, and operated more than twenty hotel properties. Appellant's App. p. 114. One of these properties is located at 100 South Green River Road in Evansville, Indiana ("Subject Property"). *Id.*

In the late 1980s, the State decided to construct the Lloyd Expressway near the Subject Property. When the Lloyd Expressway was initially constructed, all entrances connecting the Subject Property to Green River Road were eliminated. *Id.* at 129. However, the State then initiated condemnation proceedings to acquire a nearby strip of land belonging to Dunn in order to build a service road connecting the western boundary of the Subject Property to Green River Road. *Id.* at 130. The State successfully acquired the land and constructed the service road, and Dunn received compensation for the taking. *See*

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[1] Because we resolve this case based upon the summary judgment issue and do not reach the other issues raised by the State, we confine our examination of the facts to those materials designated by the parties during the summary judgment stage of the proceedings.

State v. Dunn, 837 N.E.2d 206 (Ind. Ct. App. 2005).[2]

Thereafter, the Subject Property had access, via the service road, to and from the northbound and southbound lanes of Green River Road. Appellant's App. p. 130. This changed in July 2004, when the State, acting through the Indiana Department of Transportation, installed a concrete median in the center of Green River Road, *id.* at 116, 118, near that road's interchange with State Road 66, *id.* at 165. This median prevents southbound traffic from Green River Road from making left turns into the service road entrance to the Subject Property. *Id.* at 116, 131. The elimination of left-hand turns onto the service road "was designed as a safety measure," as a southbound driver making such a turn would have to cross five lanes of oncoming northbound traffic. *Id.* at 166. The service road remains accessible to the public, although southbound drivers on Green River Road must follow a circuitous route to reach the service road and, hence, the Subject Property. The State undertook this project pursuant to its authority under Indiana Code § 8-23-8-1 to build and improve limited access facilities.[3] Appellant's App. p. 48.

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[2] This earlier case dealing with the compensation owed to Dunn is unrelated to the case at hand.

[3] A "limited access facility" is a "highway or street designed for through traffic, over, from, or to which owners or occupiers of abutting land or other persons have either no right or easement of direct access, light, air, or view because their property abuts upon the limited access facility or for any

After the State released its plan for the construction of the median but before its actual construction, Dunn, anticipating a loss in clientele because of the reduced convenience of the hotel's entrance, began remodeling the hotel in November 2003 to increase its customer base. *Id.* at 117. While the hotel had apparently operated successfully from approximately 1978 until 2004, *id.* at 129, Dunn characterizes the hotel's occupancy rates between November 2003 until the end of 2004 as "disappointing," *id.* at 118.[4]

Dunn filed an inverse condemnation action against the State, alleging that the erection of the median "has completely eliminated all access to the Hotel and Subject Property from the southbound lane of Green River Road," as it "prevents all left-hand turns from the southbound [**5] lanes of Green River Road into the Hotel's vehicular entrance." *Id.* at 32. Therefore, according to Dunn, the median "substantially and materially limited and impaired vehicular access to the Subject Property and vehicular egress from the Subject Property," and this constitutes "a taking of [his] property without just compensation." *Id.* at 33. He sought monetary compensation for the taking. The

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other reason. The highways or streets may be parkways from which trucks, busses, and other commercial vehicles are excluded or freeways open to use by all customary forms of highway and street traffic." Ind. Code § 8-23-1-28.

[4] Dunn includes in an affidavit the hotel's occupancy rates during each month of 2004 and the operating loss for the entire year. We note that the State did not construct the median until July 2004. Appellant's App. p. 118-19.

State answered and acknowledged that the median "prohibit[ed] left hand turns to and from Green River Road and the public service road." *Id.* at 46. However, the State contended that Dunn is not entitled to compensation as a matter of law because the erection of medians resulting in circuitous travel to a business is conducted according to the State's police powers and does not effect a compensable taking. *Id.* at 48. Both parties subsequently filed motions for summary judgment, and the trial court granted Dunn's motion for partial summary judgment, concluding that "a taking of Plaintiff's property rights by the Defendant, State of Indiana, has occurred." *Id.* at 219. The suit thereafter proceeded to jury trial on the issue of damages. The jury returned a verdict in favor of Dunn in the amount of $3,650,000, and the trial court entered judgment accordingly. *Id.* at 27. Upon Dunn's later motion, the trial court awarded him an additional $1,049,600 in prejudgment interest, $109 in costs, and $25,000 in attorneys' fees. *Id.* at 29. The State now appeals.

Discussion and Decision

Article I, § 21 of the Indiana Constitution provides that "[n]o person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." Indiana Code § 32-24-1-16 further provides that "[a] person having an interest in property that has been or may be required for a public use without the procedures of [the eminent domain] article or any prior law followed is entitled to have the person's damages assessed" under Indiana's statutory eminent domain procedure,

found at Indiana Code chapter 32-24-1. Cases brought pursuant to Indiana Code § 32-24-1-16 are known as inverse condemnation actions. As we have observed in the past, condemnation proceedings are comprised of two stages: (1) an initial or summary phase, and (2) the phase during which the fact finder determines damages. *City of Hammond v. Marina Entm't Complex, Inc.*, 733 N.E.2d 958, 966 (Ind. Ct. App. 2000), *trans. denied.* "During the initial or summary phase of the proceedings, the action consists solely of legal issues which are decided by the trial court." *Id.* "During the second stage of the condemnation proceedings the fact finder must determine the amount of damages sustained by the landowner." *Id.*

The State raises four issues on appeal, pertaining to both the initial phase and the damages phase of the adjudication of Dunn's inverse condemnation complaint. We find one issue dispositive: whether the trial court erred as a matter of law in granting partial summary judgment in favor of Dunn and against the State when the State built a median that forces traffic moving in certain directions to travel a more circuitous route to and from Dunn's business property. We therefore will not reach the remaining issues.

"The standard of review of a summary judgment ruling is the same as that used in the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Row v. Holt*, 864

N.E.2d 1011, 1013 (Ind. 2007) (quoting *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 152 (Ind. 2005)). All inferences are to be drawn in favor of the non-moving party. *Id.* "The party appealing from the grant of summary judgment has the burden of persuading the appellate tribunal that the trial court erroneously determined that there is no material issue of fact and that the movant was entitled to summary judgment as a matter of law." *Ind. State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 622 N.E.2d 935, 940 (Ind. 1993).

Here, the parties do not quibble about whether material issues of fact were shown by the evidence designated in support of the parties' summary judgment motions. Instead, they disagree about whether Dunn was entitled to summary judgment as a matter of law.[5] Whether a taking has occurred is a question of law, *Biddle v. BAA Indianapolis, LLC,* 860 N.E.2d 570, 575 (Ind. 2007), and we review questions of law *de novo, Bradley v. City of New Castle,* 764 N.E.2d 212, 216 (Ind. 2002).

The State contends that Dunn was not entitled to summary judgment as a matter of law because the construction of a median, resulting in a circuitous route of ingress and egress for a property, does not constitute a compensable taking under Indiana eminent domain law. Dunn counters that he is entitled to compensation under

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[5] We decline Dunn's invitation to find that the State has waived its summary judgment challenge for purposes of appeal. Appellee's Br. p. 16. The State has not waived this issue for failure to present a cogent argument.

Indiana Code § 8-23-8-1[6] and that Indiana case law "holds that a determination of a 'taking' relative to a business owner's loss of access requires a fact-sensitive inquiry to consider whether the State action interferes with the distinct investment-backed expectations of the owner and whether the State action interfered with the present use of the property so as to substantially diminish the value of the property." Appellee's Br. p. 13.

In order to determine whether a taking of property has occurred, we look at whether the plaintiff landowner has shown that he or she "has an interest in land which has been taken for a public use without having been appropriated under eminent domain laws." *Jenkins v. Bd. of County Comm'rs of Madison County*, 698 N.E.2d 1268, 1270 (Ind. Ct. App. 1998) (citing *City of Hammond, Lake County v. Drangmeister*, 173 Ind. App. 476, 364 N.E.2d 157, 159 (1977)), *reh'g denied, trans. denied.* The threshold question in determining whether a taking has occurred is whether the plaintiff landowner has a property interest in the property that has been acquired by the State. *See* Ind. Code § 32-24-1-16 (allowing inverse

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[6] Indiana Code § 8-23-8-1, the Limited Access Facilities Statute, provides authority to counties and municipalities, acting alone or in cooperation with federal, state, or local agencies, to "plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide limited access facilities for public use on all or any part of a highway . . . ." Whether Dunn is entitled to compensation for actions undertaken pursuant to this statute depends upon whether he has suffered a compensable taking.

condemnation suits where a "person ha[s] an interest in property").

"'Property' in its legal sense means a valuable right or interest in something rather than the thing itself, and is the right to possess, use and dispose of that something in such a manner as is not inconsistent with law." *State v. Ensley,* 240 Ind. 472, 164 N.E.2d 342, 348-49 (1960). It is well settled that "the right of ingress and egress is a property right which cannot be taken without compensation." *Jenkins,* 698 N.E.2d at 1270; *State v. Lovett,* 254 Ind. 27, 257 N.E.2d 298, 304 (1970); *Ensley,* 164 N.E.2d at 349 ("[A]n abutting property owner has an easement of ingress and egress in a public highway and this constitutes a property right which cannot be substantially or materially interfered with or taken away without due compensation."). However, "[a] property owner is not entitled to unlimited access to abutting property at all points along the highway," *Jenkins,* 698 N.E.2d at 1271, and our Supreme Court has made clear that a taking does not "occur where ingress and egress is made more circuitous and difficult," *Town Council of New Harmony v. Parker,* 726 N.E.2d 1217, 1222 (Ind. 2000) (citing *Ensley,* 164 N.E.2d at 348), *reh'g granted on other grounds,* 737 N.E.2d 719 (Ind. 2000); *see also Jenkins,* 698 N.E.2d at 1271. This is because "[t]he general rule is that there is no property right of an abutting property owner in the free flow of traffic past his property" and economic damage to a business due to a State action resulting in such a route "is not compensable because [the landowners] have no

property right in the free flow of traffic past their place of business." *Ensley,* 164 N.E.2d at 350.

Our Supreme Court has decided a case directly on point with the one before us today. In the case of *State v. Ensley,* the Court addressed whether an interference with a property owner's right of ingress and egress resulting from the construction of a divider strip, or median, was compensable. In that case, just as in this one, the construction of a median compelled traffic to and from a business to travel a more circuitous route. *Ensley* involved, in part, the construction of a divider strip on a busy road in Indianapolis. The divider strip blocked northbound traffic from turning directly into a business property: "Northbound traffic, instead of turning directly into the . . . entrance, [had to] continue to [an] intersection . . . where it then [could] make a left turn and drive west approximately one-half block and enter [the business]" from another entrance. *Id.* at 346. The State contended that the construction of the divider strip was an exercise of the State's police power and was, as such, not a compensable taking. *See State v. Tolliver,* 246 Ind. 319, 205 N.E.2d 672, 675 (Ind. 1965) (noting that where the State exercises its police power, no compensation is given). The business owners countered that a provision of Indiana's eminent domain statute, Burns Ind. Stat. Ann. § 3-1706 ¶ 4 (Bobbs-Merrill 1946 Replacement),[7] expressly

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[7] The present version of this statute, found at Indiana Code § 32-24-1-9(c)(4), is almost identical to the statute discussed in *Ensley.*

provided for compensation under the facts. The statute provided for damages as follows: "Such other damages, if any, as will result to any persons or corporation from the construction of the improvements in the manner proposed by the plaintiff." Burns Ind. Stat. Ann. § 3-1706 ¶ 4 (Bobbs-Merrill 1946 Replacement).

In addressing the parties' competing claims, *Ensley* articulated the rule that in order to be compensated for a loss of right of access to a property, the landowner's rights must be substantially or materially affected:

> In order to recover for the alleged impairment of their right of access [landowners] must suffer a particular private injury, and not merely an inconvenience or annoyance, even though it may be greater in degree than such as is suffered by the public generally. . . . Nor is an abutting property owner entitled to damages merely for "a partial limitation and obstruction" of the right of access. Such right must be *substantially or materially interfered with or taken away.*

Ensley, 164 N.E.2d at 347, 351. With this general rule in mind, the landowners contended that the damages suffered as a result of the construction of the divider strip were substantial and material and that they were therefore entitled to compensation. They presented evidence that the damages

resulting solely from the divider strip were $157,650.[8] *Id.* at 345. However, the *Ensley* Court pointed out that landowners have no property right in the free flow of traffic past their land and therefore concluded that the landowners were not entitled to compensation for losses resulting from the construction of the divider strip:

> Since [the business owners] have no property right in the free flow of traffic past their premises, the construction of the divider strip does not deprive them of any property right, and hence, any damage sustained thereby, by loss of business or depreciation in the value of their property, would not, for this further person, be compensable

under the Indiana eminent domain statute. *Id.* at 350. Thus, large financial loss is not the key to determining whether a taking has occurred. Instead, to have suffered a compensable injury under Indiana eminent domain law, the landowner *must* have been, first and foremost, deprived of a property right. *Ensley* makes clear that because there is "no property right in the free flow of traffic past [a landowner's] premises," the construction of a divider strip or median that acts to create a more circuitous route to and from a parcel of land "does not deprive [the landowner] of any property right" and any "loss of business or depreciation in the

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[8] We bear in mind that these were the calculated damages in 1960 or earlier.

value of the [] property" is simply non-compensable. *Id.*

Ensley's legacy is a clarification of the very different treatments that two types of loss of access claims will receive under Indiana law. On the one hand, cases which allege damages resulting from an alteration of traffic flow ("traffic flow cases") present no cognizable claim for compensation under Indiana eminent domain law because landowners do not have a property right in the free flow of traffic past their land. On the other hand, cases which allege interference with a landowner's rights of ingress and egress ("ingress/egress cases") may present a compensable taking where the interference is substantial or material. Since *Ensley*, our Supreme Court has addressed a number of cases involving landowners' loss of access claims. However, our Supreme Court has never retreated from its *Ensley* analysis. Instead, subsequent cases from that Court have split into two lines, adhering to the different treatments of these two types of claims.

Four years after *Ensley*, our Supreme Court addressed an ingress/egress case. In *State v. Geiger & Peters, Inc.*, 245 Ind. 143, 196 N.E.2d 740 (1964), the Court concluded that a landowner had suffered a compensable taking where the construction of an expressway cut off ingress and egress to and from a highway abutting one side of the landowner's property. However, in determining that this was a compensable taking, the *Geiger* Court expressly distinguished its case from *Ensley* and other traffic flow cases: "The facts of the *Ensley* case were indeed distinguishable from the case at bar as in

the former case the property owners were claiming a property right in the free and unrestricted flow of traffic passing their premises and which was diminished by the installation of the divider strip in the highway." *Id.* at 743. *Geiger* expressly reaffirmed the distinction between traffic flow cases and ingress/egress cases: "We refused in [*Ensley*] to equate such alleged 'right' to the free flow of traffic with the property rights of ingress and egress." *Id.*[9]

In *State v. Tolliver*, 205 N.E.2d at 672, and *State v. Hastings*, 246 Ind. 475, 206 N.E.2d 874 (1965), both of which were ingress/egress cases, our Supreme Court further clarified which sorts of factual scenarios are susceptible to examination for substantial and material interference with a landowner's right to access. In *Tolliver*, the Court found a right to compensation where the State placed a barrier across the road leading in and out of the landowners' property, leaving only one route of ingress and egress. The remaining access point to the property was insufficient to allow the landowners to conduct their business *at all*. The

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[9] Additionally, in *Geiger*, the Court went further than *Ensley* had in expressing the rationale for not allowing compensation for traffic flow reduction resulting from the construction of medians. While *Ensley* had not reached the question of whether the installation of divider strips was an exercise of police power (and therefore non-compensable for that reason alone) because it used Indiana eminent domain law to determine that the landowners were not entitled to compensation, *Geiger* characterized the installation of divider strips as a "regulation[] concerning the free flow of traffic" which is sustainable under the State's police power. *Geiger*, 196 N.E.2d at 743.

property contained a small steel fabricating plant that required trucks to haul raw supplies in and transport finished products out. After the State blocked the primary access route between the property and a nearby highway, the only remaining option for the trucks was to "cross[] . . . a bridge over a creek . . . which was in 'bad shape' and had a load limit of 3000 pounds. It was not of sufficient strength to support the trucks which hauled . . . products pertaining to the [landowners'] business, sometimes as much as fifty tons of steel." *Tolliver*, 205 N.E.2d at 673. In *Hastings*, the Court again found that cutting off ingress and egress to a property was compensable. In *Hastings*, the State completely severed the landowners' right to ingress and egress: "[T]he State bulldozed the entrances which had been constructed by [the landowners], dug them up and erected a fence," forcing the landowners to construct a new access route to their business. *Hastings*, 206 N.E.2d at 876.

Post *Tolliver* and *Hastings*, our Supreme Court addressed, among other things, a traffic flow claim in *State v. Jordan*, 247 Ind. 361, 215 N.E.2d 32 (1966), *reh'g denied*. In *Jordan*, business owners filed an inverse condemnation suit against the State after a highway improvement project resulted in fewer customers visiting the business due to inconvenience. *Id.* at 35. The trial court permitted witnesses to testify regarding their shopping patterns before the construction versus during the construction. In reversing the trial court and concluding that the business owners had not suffered a compensable taking as a matter of law, the Court again cited the rule that "[a] property

owner whose land does not abut on the highway is not entitled to compensation *merely because the construction makes it more difficult to get to the highway.*" Id. at 35 (emphasis added). *Jordan* rearticulated *Ensley's* holding to be that traffic flow claims involving "a mere change in the grade or widening of the highway *or the construction of a divider strip which changed the free flow of traffic*" cannot constitute "a 'taking' within the purview of the state or constitutional provision." *Id.* at 36 (emphasis added).

The following year, in *Papp v. City of Hammond,* our Supreme Court was once again presented with a case alleging loss of access due to a road construction project. 248 Ind. 637, 230 N.E.2d 326 (1967). In *Papp,* which stemmed out of a road project that created periods of "various stages of impassability" on roadways near the landowner's filling station business, the landowner's complaint was not that the construction made it more difficult to reach his business from the highway. 1 at 332. Instead, his claim was that his filling station became "inaccessible from the streets." *Id.* at 327. Thus, *Papp* represented an ingress/egress claim. The trial court granted summary judgment in favor of the City, and our Supreme Court agreed with this ruling. The Court compared the degree of loss suffered by the business owner–"temporary inconvenience and losses"—to the "general public interest in the maintenance, widening and repair of streets of the municipality" and doubted that a taking had occurred but concluded that, even if it

had, the plaintiff was not entitled to damages. *Id.* at 335.

Finally, in another case cited by both parties, our Supreme Court addressed an ingress/egress claim and concluded that the landowner was entitled to compensation for substantial loss of access. *State v. Diamond Lanes, Inc.*, 251 Ind. 520, 242 N.E.2d 632, 634 (1968). In *Diamond Lanes,* a landowner operated a bowling alley on a piece of property accessible by four access points and by traffic traveling in either direction on two roads. After the State constructed a limited access highway abutting the property that cut off access with certain directions of traffic to the business property, the landowner filed an inverse condemnation action. At first blush, *Diamond Lanes* appears to be a traffic flow case. However, the Court explained that the primary access point for customers was "completely eliminated" and the access to another road "was taken and in its place there was substituted access onto a frontage road" with a barrier and retaining wall that compelled customers to drive circuitous routes, *id.* at 634, and therefore treated the claim as an ingress/egress claim, concluding that the landowner successfully demonstrated that access was materially and substantially obstructed. It distinguished *Diamond Lanes* from *Ensley* as such: *Ensley* "did not involve the limited access statute. [It] was mainly a 'traffic case' where the property owners were claiming a property right in the free and unrestricted flow of traffic passing their premises and which was diminished by the installation of a divider strip in the highway." *Id.* We observe that, in this case,

Dunn apparently contends that *Diamond Lanes* stands for the proposition that *Ensley* does not apply to situations where properties abut limited access facilities. Appellee's Br. p. 31. Such is not the case. It is true that *Diamond Lanes* is distinguishable from *Ensley* because all of the injuries caused to the *Diamond Lanes* landowner arose out of the manner of the State's construction of a new limited access facility pursuant to Indiana statute. *See* Ind. Code § 8-23-8-1. However, since *Diamond Lanes,* our Supreme Court has cited *Ensley* as authority when analyzing a landowner's claim that access to his property was impeded by the manner in which a limited access highway was constructed. *Young v. State,* 252 Ind. 131, 246 N.E.2d 377, 379-80 (1969), *reh'g denied. Diamond Lanes* was simply commenting upon the fact that the landowner's injuries arose out of the State's construction of a new limited access facility, whereas *Ensley* involved the mere construction of a median on a preexisting roadway, and does not stand for the proposition that whether a property abuts a limited access facility will affect whether we treat a landowner's claim as a traffic flow or an ingress/egress claim.

Following these cases from our Supreme Court, this Court soon had the opportunity to address a case involving alleged business losses suffered as a result of the construction of a median strip. In *State v. Cheris,* 153 Ind. App. 451, 287 N.E.2d 777 (1972), *reh'g denied,* we examined whether the landowner's argument constituted a traffic flow claim or an ingress/egress claim such that the Court had to evaluate the degree of

interference caused to access to the property. *Id.* at 778. Recognizing the landowners' "concerted attempt to distinguish *Ensley*," we nonetheless found it directly applicable and rejected the landowners' contention that even in traffic flow cases we must examine the degree of access that has been impaired by the construction of a median. *Id.* at 780. Instead, we treated Cheris's claim as a traffic flow claim and applied *Ensley's* straightforward rule. Because we recognized that the landowners' actual argument was that they had a right to the free flow of traffic past their property, we concluded that the trial court erred in allowing an award of compensation for this loss.

Importantly, recent cases from this Court and our Supreme Court have reiterated the rule from *Ensley* that a compensable taking does not occur where traffic flow to and from a property is made more circuitous and difficult because of State action. *Town Council of New Harmony,* 726 N.E.2d at 1222 (citing *Ensley,* 164 N.E.2d at 348); *Old Romney Dev. Co. v. Tippecanoe County,* 817 N.E.2d 1282, 1288 (Ind. Ct. App. 2004); *Bussing v. Ind. Dep't of Transp.,* 779 N.E.2d 98, 105 (Ind. Ct. App. 2002), *trans. denied;*[10] *Jenkins,* 698 N.E.2d at 1271.[11]

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[10] The State contends that Dunn's claim is "nearly identical" to the claim in *Bussing,* wherein this Court held that a landowner was not entitled to damages after the State closed an intersection and blocked left-hand turns into the landowner's property. Appellant's Br. p. 18. We agree that the facts of these two cases are quite similar, and we acknowledge that in *Bussing* this Court found the scenario "akin to *Ensley,*" *Bussing,* 779 N.E.2d at 106, but then engaged in a discussion of the degree of interference the

We return now to the question before us: did Dunn suffer a compensable taking when the State constructed a median on Green River Road that compelled customers entering and exiting Dunn's hotel property, heading in certain directions, to travel a more circuitous route? To answer this question, we must determine whether to treat Dunn's suit as a traffic flow claim or an ingress/egress claim. Dunn would have us treat it as an ingress/egress claim, arguing that Indiana eminent domain law provides for a fact-sensitive

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State's action had upon access to the property in determining whether a taking occurred. While we agree with *Bussing's* outcome, we disagree with its rationale to the extent that it indicates that this discussion relating to damages is necessary to the question of whether a compensable taking occurred.

[11] The parties argue on appeal about whether Dunn's claim is actually a regulatory takings claim such that *Biddle*, 860 N.E.2d at 570, and other regulatory takings cases apply. *Biddle* articulates that the modern test for regulatory takings "states that regulation effects a taking if it deprives an owner of all or substantially all economic or productive use of his or her property." Id. at 577 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-40 (2005)). The State argues that "Dunn presents no authority suggesting that *Biddle* . . . and other such cases apply when the State makes improvements to its roadways." Appellant's Br. p. 11. We need not delve into this question because, as we conclude in this opinion, Dunn's claim is, at its heart, that he had a right to the free flow of traffic past his business. *Ensley* speaks to this issue directly, and to the extent that *Biddle* comments upon *Ensley* it does so to clarify the degree of injury that a landowner must suffer in order to have experienced a compensable taking. *Biddle*, 860 N.E.2d at 580. Pursuant to *Ensley*, we never reach that question in this case because Dunn does not have a property right in the flow of traffic.

inquiry into his damages to determine whether a taking has occurred. Appellee's Br. p. 13. He interprets the applicable case law to emphasize the issue of whether the impact upon a property is substantial and material in answering the question of whether a compensable taking has occurred. This is, however, a contention that we examined and rejected in *Cheris*, concluding that the degree of interference in traffic flow cases is simply irrelevant to the question of whether a compensable taking has occurred. *Cheris*, 287 N.E.2d at 780. In reaching this conclusion, *Cheris* applied *Ensley*, the case that still controls today.

Ensley instructs us that the construction of a divider strip, or median, that causes traffic to and from a property to travel a more circuitous route does not constitute a compensable taking under Indiana eminent domain law because the landowner does not, as a matter of law, have a property right in the flow of traffic past his or her land. *Ensley*, 164 N.E.2d at 350. In a nutshell, Dunn's argument is that because of the median, access to his hotel property became less convenient for potential guests, which led to lower occupancy rates and economic losses. Despite Dunn's efforts to distinguish his claim from that made in *Ensley*, we agree with the State that "Dunn's claim [is] one essentially showing nothing more than a non-actionable and non-compensable loss of convenient access to the hotel property." Appellant's Br. p. 22. As a matter of Indiana law, this does not constitute a compensable taking. Therefore, Dunn was not entitled to summary judgment as a matter of law.

Dunn criticizes *Ensley* as "shoddy work," which is wholly unhelpful, Appellant's App. p. 154, and we decline his request that we not apply it to this case. As explained in this opinion, *Ensley* is directly on point with the issue before us today, and its progeny have done nothing to weaken its effect. We observe that Indiana is in the firm majority of jurisdictions that have addressed whether the construction of medians in roadways constitutes a compensable taking and have concluded that it does not. Just as the Pennsylvania Supreme Court long ago noted, "The basic problem herein presented has arisen in other jurisdictions and the courts in such jurisdictions have arrived at the result reached." *Wolf v. Commonwealth Dep't of Highways*, 220 A.2d 868, 874 (Pa. 1966) (citing *Breidert v. S. Pac. Co.*, 394 P.2d 719, 725 (Cal. 1964); *LaCroix v. Commonwealth of Massachusetts*, 205 N.E.2d 228 (Mass. 1965); *Kansas City v. Berkshire Lumber Co.*, 393 S.W.2d 470 (Mo. 1965); *Painter v. State Dep't of Roads*, 131 N.W.2d 587 (Neb. 1964); *Brady v. Smith*, 79 S.E.2d 851 (W.Va. 1954); *Houghs v. Mackie*, 137 N.W.2d 289 (Mich. Ct. App. 1965); *McHale v. State of New York*, 104 N.Y.S.2d 981 (N.Y. App. Div. 1951), *aff'd.* 107 N.E.2d 593 (1952); *State of Missouri ex rel. State Highway Comm'n v. Meier*, 388 S.W.2d 855 (Mo. 1965); *Brock v. State Highway Comm'n*, 404 P.2d 934 (1965); *Holman v. State of California*, 217 P.2d 448 (Cal. Ct. App. 1950); *People v. Sayig*, 226 P.2d 702 (Cal. Ct. App. 1951); *In re Appropriation of Easements for Highway & Slope Purposes*, 137 N.E.2d 595 (Ohio Ct. App. 1955); *Snow v. State Highway Comm'n*, 136 S.E.2d 678 (N.C. 1964);

Gene's, Inc. v. City of Charlotte, 129 S.E.2d 889 (N.C. 1963); *City of San Antonio v. Easley*, 368 S.W.2d 683 (Tex. Civ. App. 1963); *Ensley*, 164 N.E.2d 342; *Northern Lights Shopping Center, Inc. v. State of New York*, 247 N.Y.S.2d 333 (N.Y. App. Div. 1964); *Nelson v. State Highway Comm'n*, 115 N.W.2d 695 (Iowa 1962); *James v. State of Idaho*, 397 P.2d 766 (Idaho 1964); *Walker v. State of Washington*, 295 P.2d 328 (Wash. 1956); *State Highway Comm'n v. Central Paving Co.*, 399 P.2d 1019 (Or. 1965); *Kahin v. City of Seattle*, 395 P.2d 79 (Wash. 1964)); *see also Ehrhart v. Agency of Transp.*, 904 A.2d 1200, 1203-04 (Vt. 2006); *County of Anoka v. Blaine Bldg. Corp.*, 566 N.W.2d 331, 336 (Minn. 1997); *Hales v. City of Kansas City*, 804 P.2d 347, 349-50 (Kan. 1991); *Hays v. City of Maryville*, 747 S.W.2d 346, 348-49 (Tenn. Ct. App. 1987); *but see State Highway Dep't v. Wilson*, 175 S.E.2d 391, 396 (S.C. 1970); *State ex rel. Mo. Highway Transp. Comm'n v. Jim Lynch Toyota, Inc.*, 830 S.W.2d 481, 484-85 (Mo. Ct. App. 1992).

We recognize that another panel of this Court recently authored *State v. Kimco of Evansville, Inc.*, 881 N.E.2d 987 (Ind. Ct. App. 2007), *reh'g denied, trans. granted*, an appeal involving another Evansville business owner's inverse condemnation action in response to the median on Green River Road. In reaching the conclusion that the landowner had suffered a compensable taking, this Court determined that, "unlike in *Ensley*, [the business's] loss of access is not based simply on the construction of the median but also, and importantly, on the reconfigured entrances on [the landowner's] property." *Id.* at

995. It is important to note that although this Court allowed recovery in that case, *Kimco* does not stand for the proposition that the construction of a median *always* constitutes a compensable taking. Instead, it expressly distances itself from such a conclusion: "Any one of these changes [the construction of the median and the reconfigured entrances] by itself might not amount to a taking of access rights. When considering all of these changes, however, we conclude that a taking has occurred as a matter of law." *Id.* Nevertheless, we must disagree with *Kimco* to the extent that it allows compensation for damages suffered as a direct result of the construction of the median. This is because *Ensley* makes clear that landowners lack property rights in traffic flow such that the construction of a median can not constitute a compensable taking. Indeed, our Supreme Court wrote that property owners "have no property right in the free flow of traffic past their premises, the construction of [a] divider strip does not deprive them of any property right, and hence, any damage sustained thereby, by loss of business or depreciation in the value of their property, would not . . . be compensable" under the Indiana eminent domain statute. *Ensley*, 164 N.E.2d at 350. In any event, our Supreme Court recently granted transfer in *Kimco*, thereby vacating the opinion. Ind. App. R. 58(A).

In conclusion, landowners have no property right to the free flow of traffic past their properties. Thus, the construction of a median in a roadway that causes traffic traveling to and from an abutting property to travel a circuitous route does

not constitute a compensable taking under Indiana eminent domain law. Therefore, Dunn was not entitled to judgment as a matter of law on the issue of whether he suffered a compensable taking, and the trial court erred in granting Dunn's motion for partial summary judgment.

Reversed.

DARDEN, J., concurs.

BARNES, J., concurs in result with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,
Appellant-Defendant,
vs.

JOHN M. DUNN,
Appellee-Plaintiff.

BARNES, Judge, concurring in result

I concur in result with the majority's decision to reverse the trial court's grant of partial summary judgment in favor of Dunn. I agree that Ensley v. State, 240 Ind. 472, 164 N.E.2d 342 (1960), is directly on point. As in Ensley, at issue here is the construction of a median that makes access to Dunn's property more circuitous and inconvenient. Ensley, 240 Ind. at 486, 164 N.E.2d at 348. I also believe that even if Dunn suffered a decline in his business because of the construction of the median, he has not shown that the construction of the median resulted in a "particular private injury" greater than such suffered by the public generally. Id. at 484, 240 N.E.2d at 347. Dunn's property was accessed by a State-owned service road prior to the construction and continues to be accessed by the same service road after the construction. The building of the median did not result in a private injury to Dunn.

However, I must depart with the majority regarding its discussion of State v. Kimco, 881 N.E.2d 987 (Ind. Ct. App. 2007), trans. granted. As the author of Kimco, I am well aware of the facts of that case, and I must conclude that it is inapposite to the case before us today. Kimco arose from a different procedural posture and a significantly different factual scenario. Although transfer has been granted in Kimco, the facts of this case are on all fours with Ensley; the facts of Kimco, in my opinion, were not. Accordingly, I concur in result.

STATE OF INDIANA
COUNTY OF VANDERBURGH
The Honorable J. Douglas Knight, Special Judge
[Filed Sept. 12, 2005]

IN THE VANDERBURGH CIRCUIT COURT
2005 TERM
Cause No. 82C01-0309-PL-668

JOHN M. DUNN,
Plaintiff,
v.
STATE OF INDIANA,
Defendant.

SUMMARY JUDGMENT ENTRY OF SEPTEMBER 2, 2005

This matter comes before the Court on Defendant's Motion for Summary Judgment as to Plaintiff's Amended Complaint and on Plaintiff's Cross-Motion for Partial Summary Judgment on its Amended Complaint as to the issue of whether a taking of Plaintiff's property rights by Defendant has occurred. The Plaintiff is represented by counsel and the Defendant is represented by counsel. The Court having considered the respective parties' motions, briefs, and evidentiary submissions and having heard argument by counsel on the motions, and the Court being duly and sufficiently advised in the premises now **GRANTS** Plaintiff's Cross-Motion for Partial Summary Judgment and finds that a taking of Plaintiff's property rights by the Defendant, State of Indiana,

has occurred. The Defendant's Motion for Summary Judgment is **DENIED**.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff, John M. Dunn, have and recover partial summary judgment against Defendant, State of Indiana, on Plaintiff's Amended Complaint, on the ground that a taking of Plaintiff's property rights by Defendant has occurred.

The Court further orders the parties to appear on October 3, 2005, at 9:00 o'clock a.m., for purposes of finalizing the appointment of appraisers and instructions to the appraisers.

DATED this ____ day of September, 2005.

s/ J. Douglas Knight
HONORABLE J. DOUGLAS KNIGHT, SPECIAL JUDGE VANDERBURGH SUPERIOR COURT

Copies to:

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CLERK
SUPREME COURT, COURT OF APPEALS,
AND TAX COURT
STATE OF INDIANA
217 State House, Indianapolis, IN 46204
317-232-1930 • Fax 317-232-8365

(Seal of the Supreme Court, State of Indiana)
Kevin S. Smith
Clerk

Cause Number 82A01-0705-CV-00223
Lower Court Number 82C01-0309-PL-668

STATE OF INDIANA -V- DUNN, JOHN M

You are hereby notified that the SUPREME COURT has on this day 8/19/08 APPELLEE'S PETITION FOR REHEARING DENIED.

FOR THE COURT, JOHN G. BAKER, CHIEF JUDGE
ALL PANEL JUDGES CONCUR.

KJ

WITNESS my name and the seal of said Court, this 19th day of August, 2008.

s/ Kevin S. Smith
Clerk, Supreme Court, Court of Appeals and Tax Court

CLERK
SUPREME COURT, COURT OF APPEALS, AND
TAX COURT
STATE OF INDIANA
217 State House, Indianapolis, IN 46204
317-232-1930 • Fax 317-232-8365
(Seal of the Supreme
Court, State of Indiana)
Kevin S. Smith
Clerk

Cause Number 82A01-0705-CV-00223
Lower Court Number 82C01-0309-PL-668

STATE OF INDIANA -V- DUNN, JOHN M

You are hereby notified that the SUPREME COURT has on this day 3/04/09

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION.

EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER OF THE COURT HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES. BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLEE'S PETITION TO TRANSFER OF JURISDICTION WITHOUT OPINION.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR.

KM

WITNESS my name and the seal of said Court, this 4TH day of MARCH, 2009.

s/ Kevin S. Smith
Clerk, Supreme Court, Court of Appeals and Tax Court